

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 ELISSA RUBENSTEIN, ) Case No. CV 13-9549 JLS (KK)  
11 )  
12 Plaintiff, )  
13 v. ) ORDER DISMISSING PLAINTIFF'S  
14 WHITTIER POLICE DEPARTMENT, et ) FOURTH AMENDED COMPLAINT WITH  
15 al., ) LEAVE TO AMEND  
16 Defendants. )  
17

18 I.

19 INTRODUCTION

20 On August 27, 2014, plaintiff, proceeding *in forma pauperis*,  
21 filed a *pro se* Fourth Amended Complaint ("FAC") alleging two  
22 civil rights claims against nine named Whittier Police Department  
23 ("WPD") officers, in their individual capacities. Upon screening  
24 the FAC pursuant to 28 U.S.C. § 1915(e)(2), the Court finds that  
25 plaintiff's allegations state a claim under the Fourth Amendment  
26 in regard to defendants Nyberg, Plank, Bolanos, Karson, Jensen,  
27 Cheng, and Esquivel, but do not state a claim in regard to the

1 remaining two defendants or her other cause of action.  
2 Accordingly, the FAC is dismissed with leave to amend. If  
3 plaintiff desires to pursue this action, she is ORDERED to file  
4 within 28 days of the service date of this Order a Fifth Amended  
5 Complaint remedying the deficiencies discussed below or,  
6 alternatively, a voluntary dismissal of all claims and defendants  
7 unrelated to her cognizable Fourth Amendment claim against the  
8 aforementioned seven defendants.

9 II.

10 PROCEDURAL BACKGROUND

11 On January 8, 2014, plaintiff Elissa Rubenstein  
12 ("plaintiff"), who is at liberty and has been granted leave to  
13 proceed *in forma pauperis*, filed a *pro se* Civil Rights Complaint  
14 ("Original Complaint") pursuant to 42 U.S.C. § 1983 ("Section  
15 1983"). (ECF Docket No. ("dkt.") 1). Plaintiff sued the WPD and  
16 "Does 1-10" ("Doe Defendants"). Plaintiff sued the Doe  
17 Defendants in their individual and official capacities, and  
18 sought monetary relief from all defendants.

19 On January 14, 2014, this Court dismissed the Original  
20 Complaint and granted plaintiff leave to amend to the extent  
21 plaintiff could state any viable claims against the defendants.  
22 (Dkt. 8). On January 28, 2014, plaintiff filed a First Amended  
23 Complaint which alleged multiple civil rights claims against only  
24 defendant WPD – apparently predicated on most of the same  
25 misconduct alleged in the Original Complaint—and sought monetary  
26 relief from defendant WPD. (Dkt. 9). On February 25, 2014, this  
27 Court dismissed the First Amended Complaint because it failed to

1 comply with Rule 8 ("Rule 8") and Rule 10 ("Rule 10") of the  
2 Federal Rules of Civil Procedure and failed to state a viable  
3 Section 1983 claim for municipal liability against defendant WPD.  
4 (Dkt. 11). The Court granted plaintiff leave to amend to the  
5 extent she could state any viable claims against the defendant.

6 On March 11, 2014, plaintiff filed a Second Amended  
7 Complaint which alleged multiple civil rights claims against  
8 eleven named WPD officers<sup>1</sup> and defendant WPD, again apparently  
9 predicated on most of the same misconduct alleged in plaintiff's  
10 first two complaints. (Dkt. 12). Plaintiff sued the individual  
11 defendants in their official capacities only, and sought monetary  
12 relief from all defendants. On April 23, 2014, this Court  
13 dismissed the Second Amended Complaint because it again failed to  
14 comply with Rules 8 and 10 of the Federal Rules of Civil  
15 Procedure and also failed to state a viable Section 1983  
16 municipal liability claim. (Dkt. 15). The Court granted  
17 plaintiff leave to amend to the extent she could state any viable  
18 claims against the defendants.

19 On April 30, 2014, plaintiff filed the Third Amended  
20 Complaint, which alleged multiple civil rights claims against  
21 defendant WPD and the same eleven named WPD officers, again  
22 apparently predicated on most of the same misconduct alleged in  
23 plaintiff's first three complaints. (Dkt. 16). Plaintiff again  
24 sued the individual defendants in their official capacities only,  
25 and sought only monetary relief. On August 15, 2014, this Court

---

26 <sup>1</sup> Specifically, the Second Amended Complaint sued WPD officers  
27 Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, Esquivel,  
28 Harrison, Becker, Hedgpeth, and Dineen.

1 dismissed the Third Amended Complaint, finding that plaintiff  
2 stated a viable Fourth Amendment claim against nine of the eleven  
3 named WPD officers in their individual capacities,<sup>2</sup> but failed to  
4 state a claim in regard to all of her other causes of action  
5 against all other defendants. (Dkt. 20). The Court also found  
6 that plaintiff could plausibly allege facts in support of her  
7 procedural due process-based defamation claim in a later  
8 complaint. Hence, the Court granted plaintiff leave to amend,  
9 instructing plaintiff that she could elect to either (1) proceed  
10 solely on her cognizable Fourth Amendment claim against the nine  
11 WPD defendants in their individual capacities; or (2) file a  
12 Fourth Amended Complaint including her Fourth Amendment claim and  
13 additional facts in support of her procedural due process-based  
14 defamation claim.

15 Plaintiff appears to have pursued the latter of these two  
16 options. On August 27, 2014, plaintiff filed the instant FAC,  
17 asserting two civil rights claims under 42 U.S.C. § 1983, against  
18 the nine WPD officers identified by the Court in its Order  
19 dismissing the Third Amended Complaint, in their individual  
20 capacities. (Dkt. 22). Plaintiff seeks only monetary relief.  
(FAC at 31-36).

21 ///

22 ///

23 ///

24 ///

---

25  
26 <sup>2</sup> The nine officers in question were WPD officers Nyberg,  
27 Plank, Bolanos, Karson, Jensen, Cheng, Esquivel, Harrison, and  
Becker.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
III.ALLEGATIONS IN THE FACA. Factual Allegations

On the afternoon of February 4, 2009, plaintiff was seriously injured in an automobile accident with another car. (FAC at 3-5, 19). Suffering from severe bleeding, Plaintiff left the scene of the accident and went back to her home. (Id. at 5, 19). Suddenly, about twenty minutes after the accident, defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, and Esquivel barged into plaintiff's home, without knocking or asking for plaintiff's consent to enter. (Id. at 19). The defendants did not have a warrant or probable cause. (Id.). Believing plaintiff to have been driving under the influence of alcohol, the defendants seized plaintiff, confined her to her chair, and interrogated her for a two-hour period without any break. (Id. at 20). Throughout the interrogation, plaintiff remained compliant and asserted that while she was not intoxicated, she regretted leaving the scene of the automobile accident. (Id. at 21). Despite plaintiff's statements, the defendants continued interrogating her and never administered any standard drunk driving tests to determine whether she was intoxicated. (Id. at 21-22).

Further, believing plaintiff to be engaged in illegal drug use, the defendants searched plaintiff's desk, drawers, bathroom medicine cabinet, and handbag. (Id. at 20). Upon finding plaintiff's prescription medications, the defendants asked

1 plaintiff accusingly what each prescribed medication was for.

2 (Id. at 20-21).

3 Throughout these events, two WPD officers, defendants Becker  
4 and Harrison, were in constant radio communication with the other  
5 seven defendants at the scene. (Id. at 21). Plaintiff

6 speculates that defendants Becker and Harrison "must have  
7 condoned and acknowledged as okay the actions of those present."

8 (Id. at 25).

9 At some point during the events, plaintiff's fiancé's mother  
10 came to check on plaintiff and requested the defendants at the  
11 scene to leave. (Id. at 22-23). The defendants disregarded her  
12 request. (Id. at 23).

13 Subsequently, after hearing of the incident, plaintiff's  
14 fiancé ended their engagement. (Id.). Plaintiff's fiancé was  
15 angry that the defendants had disturbed his mother and believed  
16 plaintiff to have committed some crime. (Id.). As a result,  
17 plaintiff entered "a downward spiral" which "caus[ed] her to  
18 slowly begin to lose her planned marital bond, her love, her  
19 future plans, her financial security, her career plans and  
20 ability to work at the profession she was engaged in of a  
21 Certified Nurse Assistant, her home and eventually her  
22 mental/emotional and physical health." (Id. at 24). Plaintiff  
23 also suffered psychosis during the few years following the end of  
24 her engagement and suffered physical symptoms, including chest  
pains, tachycardia, and shortness of breath. (Id. at 29).

25 ///

26 ///

1 **B. Legal Claims**

2 The FAC asserts two legal claims against all defendants in  
3 their individual capacities:

4 (1) Claim One: Fourth Amendment: Plaintiff claims defendants  
5 Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, Esquivel,  
6 Harrison, and Becker deprived her of her Fourth Amendment  
7 right to be free from unreasonable searches and seizures by:

8 (a) entering and searching her home without a warrant  
9 on February 4, 2009; and

10 (b) seizing her and interrogating her without a warrant  
11 or probable cause. (FAC at 19-24).

12 (2) Claim Two: Fourteenth Amendment (Procedural Due  
13 Process): Plaintiff claims defendants Nyberg, Plank,  
14 Bolanos, Karson, Jensen, Cheng, Esquivel, Harrison, and  
15 Becker violated her rights to procedural due process, under  
16 the Due Process Clause of the Fourteenth Amendment, by:

17 (a) entering and searching her home and detaining her  
18 without a warrant on February 4, 2009 instead of  
19 instituting an objective process to determine the truth  
20 of their suspicion that plaintiff was intoxicated; and

21 (b) ruining and "defaming" plaintiff's reputation among  
22 her former fiancé and her fiancé's mother, by their  
23 actions on February 4, 2009. (FAC at 25-30).

24 **IV.**

25 **STANDARD OF REVIEW**

26 As plaintiff is proceeding *in forma pauperis*, the Court must  
27 screen the FAC prior to ordering service on any defendant, and is  
28

1 required to dismiss the case at any time if it concludes the  
2 action is frivolous or malicious, fails to state a claim on which  
3 relief may be granted, or seeks monetary relief against a  
4 defendant who is immune from such relief. See 28 U.S.C. §  
5 1915(e)(2)(B); see also Barren v. Harrington, 152 F.3d 1193, 1194  
6 (9th Cir. 1998).

7 In determining whether a complaint fails to state a claim  
8 for purposes of screening under 28 U.S.C. § 1915(e)(2)(B)(ii),  
9 the Court applies the same pleading standard from Rule 8 of the  
10 Federal Rules of Civil Procedure as it would when evaluating a  
11 motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).  
12 See Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012).

13 Under Rule 8(a), a complaint must contain a "short and plain  
14 statement of the claim showing that the pleader is entitled to  
15 relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule  
16 8 announces does not require 'detailed factual allegations,' but  
17 it demands more than an unadorned, the-defendant-unlawfully-  
18 harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129  
19 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic  
20 Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed.  
21 2d 929 (2007)). "[A] complaint must contain sufficient factual  
22 matter, accepted as true, to 'state a claim to relief that is  
23 plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570).  
24 "[A] complaint [that] pleads facts that are 'merely consistent  
25 with' a defendant's liability . . . 'stops short of the line  
26 between possibility and plausibility of entitlement to relief.'" Id.  
27 (quoting Twombly, 550 U.S. at 557). In addition, although a  
28



1 court must accept as true all factual allegations contained in a  
2 complaint, a court need not accept a plaintiff's legal  
3 conclusions as true. Id. "Threadbare recitals of the elements  
4 of a cause of action, supported by mere conclusory statements, do  
5 not suffice." Id. (quoting Twombly, 550 U.S. at 555).

6 Especially in civil rights cases, a *pro se* plaintiff's  
7 pleadings are liberally construed to afford the plaintiff "the  
8 benefit of any doubt." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th  
9 Cir. 2012) (quoting Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th  
10 Cir. 1985) (*en banc*)) (internal quotation marks omitted). If,  
11 however, a court finds that a *pro se* complaint has failed to  
12 state a claim, dismissal may be with or without leave to amend.  
13 Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). *Pro se*  
14 plaintiffs should be permitted leave to amend unless it is  
15 absolutely clear that the complaint's deficiencies cannot be  
16 cured. Cafasso v. General Dynamics C4 Sys., Inc., 637 F.3d 1047,  
17 1058 (9th Cir. 2011) ("Normally, when a viable case may be pled,  
18 a district court should freely grant leave to amend."). A court  
19 may consider factual allegations outside of the complaint in  
20 determining whether to grant leave to amend. See Broam v. Bogan,  
320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

21 v.

## 22 DISCUSSION

### 23 A. Section 1983 Individual Capacity Claims

24 In order to state a claim for a civil rights violation under  
25 42 U.S.C. section 1983, a plaintiff must allege that a particular  
26 defendant, acting under color of state law, deprived plaintiff of  
27

1 a right guaranteed under the U.S. Constitution or a federal  
2 statute. 42 U.S.C. § 1983; see West v. Atkins, 487 U.S. 42, 48,  
3 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Suits against  
4 government officials under Section 1983 in their individual  
5 capacities "seek to impose personal liability upon a government  
6 official for actions he takes under color of state law."  
7 Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed.  
8 2d 114 (1985). "A person deprives another of a constitutional  
9 right, within the meaning of section 1983, if he does an  
10 affirmative act, participates in another's affirmative acts, or  
11 omits to perform an act which he is legally required to do that  
12 causes the deprivation of which [the plaintiff complains]."  
13 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

14 In short, "there must be a showing of personal participation  
15 in the alleged rights deprivation . . . ." Jones v. Williams,  
16 297 F.3d 930, 934 (9th Cir. 2002) (internal citation omitted).  
17 See also Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)  
18 ("Liability under section 1983 arises only upon a showing of  
19 personal participation by the defendant."). While individual  
20 governmental agents may still be held liable for group  
21 participation in unlawful conduct, there must be some showing of  
22 "individual participation in the unlawful conduct" for imposition  
23 of liability under Section 1983. Absent such individual  
24 participation, an officer cannot be held liable based solely on  
25 membership in a group or team that engages in unconstitutional  
26 conduct unless each officer was an "integral participant" in the  
27  
28

1 constitutional violation alleged. Chuman v. Wright, 76 F.3d 292,  
2 294 (9th Cir. 1996). See also Jones, 297 F.3d at 934.

3 **B. Claim One: Fourth Amendment**

4 The Fourth Amendment requires that an officer have probable  
5 cause before arresting a suspect, such that "an arrest without  
6 probable cause violates the Fourth Amendment and gives rise to a  
7 claim for damages under [Section] 1983." Lee v. City of Los  
8 Angeles, 250 F.3d 668, 685 (9th Cir. 2001) (internal citations  
9 and quotation marks omitted). Similarly, a warrantless entry  
10 into a person's home to effect an arrest is presumed to be  
11 unreasonable under the Fourth Amendment absent probable cause.  
12 See Payton v. New York, 445 U.S. 573, 586, 590, 100 S. Ct. 1371,  
13 63 L. Ed. 2d 639 (1980) (warrantless arrest in suspect's dwelling  
14 presumptively unreasonable); LaLonde v. Cnty. of Riverside, 204  
15 F.3d 947, 954 (9th Cir. 2000) ("It is a basic principle of Fourth  
16 Amendment law that searches and seizures inside a home without a  
17 warrant are presumptively unreasonable.") (internal citation and  
18 quotation marks omitted). Probable cause exists when, "under the  
19 totality of circumstances known to the arresting officers, a  
20 prudent person would have concluded that there was a fair  
21 probability that [the defendant] had committed a crime." Grant  
22 v. City of Long Beach, 315 F.3d 1081, 1085 (9th Cir. 2002)  
23 (internal citation omitted). "A police officer has probable  
24 cause to effect an arrest if 'at the moment the arrest was made .  
25 . . the facts and circumstances within [his] knowledge and of  
26 which [he] had reasonably trustworthy information were sufficient  
27 to warrant a prudent man in believing' that the suspect had  
28

1 violated a criminal law." Orin v. Barclay, 272 F.3d 1207, 1218  
2 (9th Cir. 2001) (quoting Beck v. State of Ohio, 379 U.S. 89, 91,  
3 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)).

4 Here, as was the case with plaintiff's Third Amended  
5 Complaint, the FAC's allegations regarding the warrantless entry  
6 and search of plaintiff's home on February 4, 2009 generally  
7 state a plausible Fourth Amendment claim. However, *unlike*  
8 plaintiff's Third Amended Complaint, the FAC itself alleges *only*  
9 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, and  
10 Esquivel *directly participated* in the warrantless entry.  
11 According to the FAC, the two remaining WPD defendants,  
12 defendants Becker and Harrison, did not participate in the  
13 warrantless entry and were only in radio communication with the  
14 officers that did. (FAC at 21). While plaintiff speculates that  
15 defendants Becker and Harrison "must have condoned and  
16 acknowledged as okay the actions of those present" at her home,  
17 mere knowledge or approval is insufficient to establish liability  
18 under Section 1983. (Id. at 25). To hold defendants Becker and  
19 Harrison liable under Section 1983, plaintiff must allege they  
20 either performed "an affirmative act, participate[d] in another's  
21 affirmative acts, or omit[t]ed to perform an act which [they  
22 were] legally required to do that cause[d]" the constitutional  
violation alleged. Duffy, 588 F.2d at 743.

23 Consequently, unlike the Third Amended Complaint, the Court  
24 must hold that the FAC fails to state a Section 1983 individual  
25 capacity claim under the Fourth Amendment against defendants  
26 Becker and Harrison and only states a plausible claim against the  
27  
28

1 seven defendants actually involved in the February 2009 incident.  
2 Accordingly, Claim One, as against defendants Becker and  
3 Harrison, must be dismissed with leave to amend.

4 **C. Claim Two: Fourteenth Amendment (Procedural Due Process)**

5 The procedural due process guarantee in the Due Process  
6 Clause of the Fourteenth Amendment requires "some kind of a  
7 hearing *before* the State deprives a person of [a] liberty or  
8 property [interest]." Zinermon v. Burch, 494 U.S. 113, 127, 110  
9 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (emphasis in original).

10 Plaintiff alleges the defendants violated her procedural due  
11 process rights on February 4, 2009 by failing to establish an  
12 objective process by which to determine the truth of their  
13 suspicions that she was intoxicated. (FAC at 27). That is,  
14 plaintiff claims that, instead of administering a breathalyzer  
15 test to determine whether plaintiff was intoxicated, defendants  
16 unnecessarily detained her and interrogated her. (Id. at 27-29).  
17 Plaintiff's procedural due process claim is based on essentially  
18 the same conduct (*i.e.* plaintiff's wrongful detention by the  
19 defendants) that is the predicate for Claim One, which arises  
20 under the Fourth Amendment. Accordingly, plaintiff's claim is  
21 subject to analysis under Fourth Amendment principles, rather  
22 than under the Fourteenth Amendment. See Cnty. of Sacramento v.  
23 Lewis, 523 U.S. 833, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043  
24 (1998) (noting that if a specific constitutional provision covers  
25 a plaintiff's constitutional claim (*e.g.*, the Fourth Amendment),  
26 "the claim must be analyzed under the standard appropriate to  
27 that specific provision," and not under general due process)

1 (internal citations omitted). See also Graham v. Connor, 490  
2 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)  
3 ("Because the Fourth Amendment provides an explicit textual  
4 source of constitutional protection against this sort of  
5 physically intrusive governmental conduct, that Amendment, not  
6 the more generalized notion of 'substantive due process,' must be  
7 the guide for analyzing [excessive force claims relating to  
8 arrest or seizure by law enforcement]."). Hence, in light of the  
9 separate Fourth Amendment claim, plaintiff's procedural due  
10 process claim, as it relates to her detention on February 4,  
11 2009, is superfluous and must be analyzed under Fourth Amendment  
12 principles.

13 Plaintiff also alleges defendants "defamed" her before her  
14 fiancé and her fiancé's mother because their actions on February  
15 4, 2009 damaged her reputation. (FAC at 26-28). To the extent  
16 these allegations attempt to assert a Section 1983 claim for  
17 defamation, based on the procedural protections of the Due  
18 Process Clause, plaintiff fails to state a claim. To amount to a  
19 procedural due process violation giving rise to a viable Section  
20 1983 defamation claim, a plaintiff must allege injury to  
21 reputation "plus" loss of a recognizable property or liberty  
22 interest. See Herb-Hallman Chevrolet, Inc. v. Nash-Holmes, 169  
23 F.3d 636, 645 (9th Cir. 1999) ("There are two ways to state a  
24 cognizable § 1983 claim for defamation-plus: (1) allege that the  
25 injury to reputation was inflicted in connection with a federally  
26 protected right; or (2) allege that the injury to reputation  
27 caused the denial of a federally protected right.") (internal  
28 citation omitted). However, plaintiff has not alleged defamation

1 as a threshold matter. Plaintiff alleges no facts showing the  
2 defendants in any way defamed her and only claims reputational  
3 harm from the defendants' actions on February 4, 2009. In short,  
4 plaintiff's "defamation" claim also simply appears to challenge  
5 the *same conduct* that is the predicate for plaintiff's Fourth  
6 Amendment claim. Such allegations are insufficient to state a  
7 claim of defamation under Section 1983 and are more properly  
8 subject to analysis as part of plaintiff's Fourth Amendment  
9 claim. See Lewis, 523 U.S. at 843. Accordingly, Claim Two must  
10 be dismissed with leave to amend.

11 **VI.**

12 **ADVISEMENT REGARDING FIFTH AMENDED COMPLAINT**

13 Because any Fifth Amended Complaint will be plaintiff's  
14 **fifth** opportunity to amend her complaint to rectify pleading  
15 deficiencies, the Court advises plaintiff that it will not be  
16 disposed toward another dismissal without prejudice and with  
17 leave to amend. "[A] district court's discretion over amendments  
18 is especially broad 'where the court has already given a  
19 plaintiff one or more opportunities to amend his complaint.'"  
20 Ismail v. County of Orange, 917 F. Supp. 2d 1060, 1066 (C.D. Cal.  
21 2012) (Valerie Baker Fairbank, J.) (quoting DCD Programs, Ltd. v.  
22 Leighton, 833 F.2d 183, 186 n.3 (9th Cir. 1987)); see also Zavala  
23 v. Bartnik, 348 F. App'x 211, 213 (9th Cir. 2009) ("Dismissal  
24 with prejudice was proper because Zavala was given two prior  
25 opportunities to amend his complaint in order to correct the  
26 deficiencies identified by the district court but failed to do  
27 so." ).  
28

1 If plaintiff fails timely to file a Fifth Amended Complaint,  
2 the dismissal will be converted to a "with prejudice" dismissal  
3 due to a lack of prosecution and failure to comply with the  
4 Court's order. Likewise, if plaintiff does file a Fifth Amended  
5 Complaint, but the Fifth Amended Complaint still contains claims  
6 on which relief cannot be granted, **the dismissal will be**  
7 **converted to a "with prejudice" dismissal.**

8 **VII.**

9 **LEAVE TO FILE A FIFTH AMENDED COMPLAINT**

10 For the foregoing reasons, the FAC is subject to dismissal,  
11 except for plaintiff's Fourth Amendment claim as against  
12 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, and  
13 Esquivel, in their individual capacities.

14 Accordingly, **IT IS ORDERED THAT:**

15 1) **Within 28 days of the service date of this Order,**  
16 **plaintiff may file a Fifth Amended Complaint to attempt to cure**  
17 **the deficiencies discussed above.** The Clerk is directed to  
18 provide plaintiff with a Central District of California Civil  
19 Rights Complaint Form, CV-66, to facilitate plaintiff's filing of  
20 an Fifth Amended Complaint if she elects to proceed with this  
21 action. Plaintiff is strongly encouraged to use that form.

22 2) **Alternatively, plaintiff may voluntarily dismiss all**  
23 **claims and defendants unrelated to her cognizable Fourth**  
24 **Amendment claim (Claim One) against defendants Nyberg, Plank,**  
25 **Bolanos, Karson, Jensen, Cheng, and Esquivel, and proceed on her**  
26 **Fourth Amendment claim alone.** In other words, plaintiff must:  
27 (a) file a voluntary dismissal of (i) defendants Becker and  
28 Harrison in their individual capacities, and (ii) Claim Two; and



1 (b) proceed *only* on Claim One against defendants Nyberg, Plank,  
2 Bolanos, Karson, Jensen, Cheng, and Esquivel, in their individual  
3 capacities *only*. If plaintiff elects to dismiss these defendants  
4 and claims, she should file within 28 days of the service date of  
5 this Order, a document captioned "Voluntary Dismissal" in which  
6 she identifies the claims and the defendants she is dismissing  
7 from the action.

8 3) If plaintiff chooses to file a Fifth Amended Complaint,  
9 the Fifth Amended Complaint should bear the docket number  
10 assigned to this case, be labeled "Fifth Amended Complaint," and  
11 be complete in and of itself without reference to the FAC or any  
12 other pleading, attachment, or document. Plaintiff is advised  
13 that the allegations regarding the Fourth Amendment claim, as  
14 presented in the FAC, are sufficient to state a claim against  
15 defendants Nyberg, Plank, Bolanos, Karson, Jensen, Cheng, and  
16 Esquivel. Although she must include them in any Fifth Amended  
17 Complaint she files, she need not supplement them with any  
18 additional facts. However, with respect to plaintiff's Fourth  
19 Amendment claim against defendants Becker and Harrison, plaintiff  
20 must allege additional facts showing their direct personal  
21 involvement in the Fourth Amendment violation alleged.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Plaintiff is admonished that if she fails to timely file a  
2 sufficient Fifth Amended Complaint or, alternatively, a voluntary  
3 dismissal as described above, the Court will recommend that this  
4 action be dismissed with prejudice on the grounds set forth above  
5 and/or for failure to diligently prosecute.

6  
7 DATED: September 25, 2014

  
8 HON. KENLY KIYI KATO  
9 UNITED STATES MAGISTRATE JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28